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## “AGENCY BY ESTOPPEL.”

The liability of a principal for all contracts entered into on his behalf by an agent acting within his apparent or ostensible authority is universally recognized.<sup>1</sup>

To discover the theory underlying this liability is the purpose of the present article. The discussion is undertaken at the present time because of the fact that text-writers and, to some extent at least, the courts are beginning to base the doctrine in question upon principles other than those on which it seems to have been based in the past, and in so doing are forsaking unnecessarily the true principles of this branch of our law of agency. The new view which seems to be gaining acceptance is, that the liability of the principal in these cases of apparent as distinguished from real authority, so-called, is nothing more and nothing less than an application of the doctrine of estoppel by misrepresentation. Among the text-writers, the leading exponent of this view would seem to be Mr. John S. Ewart, who in his recent brilliant and interesting work on estoppel,<sup>2</sup> contends that, so far as the law of contracts is concerned, the principal is bound, and can be bound only when the agent was authorized actually to do what he did, i. e., only when the agent has obeyed in all respects the instructions of his principal. If then, the principal is bound where the agent has departed from his instructions or real authority, but has at the same time kept within his apparent authority, it is not because a valid contract has arisen between the principal and the third party, but because the principal is estopped to deny that this is the case.

“A man cannot be bound by the act of another unless he authorized it. Nevertheless, if he personally represents that he has authorized it, and on the faith of that representation some third party has changed his posi-

<sup>1</sup> *Pickering v. Busk* (1812) 15 East 38; *Whitehead v. Tuckett* (1812) 15 East 400; *Hatch v. Taylor* (1840) 10 N. H. 538; *Smith v. McGuire* (1858) 3 H. & N. 554; *Edmonds v. Bushell & Jones* (1865) L. R. 1 Q. B. 97; *Bentley v. Doggett* (1881) 51 Wis. 224; *Anon. v. Harrison* (1698) 12 Mod. 346, etc.

<sup>2</sup> “The Principles of Estoppel by Misrepresentation,” Chicago 1900: Callaghan & Co.

tion, he ought to be estopped from denying the existence of authority. In such case the act was, and remains, unauthorized; but there is estoppel against so saying. Assisted misrepresentation will also estop; if the ostensible agent is the one who makes the representation of authority, and the supposed principal has merely assisted that representation—done that which has made it credible,—he will be as much estopped as if he had himself made the representation. For example, if I should employ a broker to sell some shares, he would appear to have all the authority usually possessed by a broker. Now suppose that I had in fact limited that authority, and the broker nevertheless acted as though it were unlimited, I would be estopped from denying his possession of customary power; because I had, by my employment of that particular kind of person, given the appearance of usual authority."<sup>1</sup>

In the last edition of Huffcut on Agency,<sup>2</sup> we find the same doctrine enunciated, as follows :

" The application of this doctrine to the law of agency is of the first importance. It may be involved, not only in the question as to the existence of the agency, but also in the question as to its nature and extent. Heretofore we have seen that a principal may be bound by the act of an agent, either because he authorized it or because he ratified it. We have now to observe that he may be bound, when he neither authorized nor ratified, upon the doctrine that he has, by his representations or conduct, led third persons to believe, that the agent possessed the requisite authority, and is therefore estopped to deny it \* \* \*."<sup>3</sup>

This view, moreover, finds support in the language of the courts in a number of cases :

" But the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."<sup>4</sup>

In *Freeman v. Cooke*, Baron Parke said :

" By the term ' wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take his representations to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence

<sup>1</sup> Ewart, pp. 473-474.

<sup>2</sup> Boston 1901: Little, Brown & Co.

<sup>3</sup> Huffcut on Agency, p. 64, § 52.

<sup>4</sup> *Pickard v. Sears* (1837) 6 Ad. & E. 469-474, per Lord Denman, C. J.

or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect."<sup>1</sup>

Chief Baron Pollock, in *Reynell v. Lewis*, expressed himself as follows:

" Agency may be created by the immediate act of the party, that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency ; or it may be created by the representation of the defendant to the plaintiff, that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such ; and if the plaintiff really makes the contract on the faith of the defendant's representations, the defendant is bound ; *he is estopped* from disputing the truth of it with respect to that contract ; and the representation of an authority is, *quoad hoc*, precisely the same as a real authority given by the defendant to the supposed agent. This representation may be made directly to the plaintiff, or made publicly so that it may be inferred to have reached him, and may be made by words or by conduct."<sup>2</sup>

In his dissenting opinion to *Pole v. Leask*, Lord Cransworth said :

" First, then, as to the constitution by the principal of another to act as his agent. No one can become the agent of another person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that person is understood to represent and act for the person who has so placed him ; but in every case it is only by the will of an employer that an agency can be created.

" This proposition, however, is not at variance with the doctrine that where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that belief, then, unless he interposes, he will, in general *be estopped* from disputing the agency, though in fact no agency existed. It is, however, necessary to bear in mind, the difference between this agency by estoppel, if I may so designate it, and a real agency, however constituted."<sup>3</sup>

In opposition to these, the thesis of the present article is that the liability in question is a true contractual liability, as well where the authority of the agent is only apparent as where it is real ; in other words, that the principal is bound because according to all sound principles he has entered into a contract with the third party. I main-

<sup>1</sup> (1848) 2 Exch. 654, 663.      <sup>2</sup> (1846) 15 M. & W. 517, 527-528.

<sup>3</sup> H. L. 1863) 33 L. J. N. S. Ch. 155, 161-162.

tain farther not only that the contractual theory is the correct one, but that it is the only one which will satisfactorily account for the law as it is.

Before entering upon the discussion of the main question it may be well to call to mind one or two things. First, the liability of the principal in these cases of apparent authority only was recognized long before the courts of common law ever heard of the doctrine of estoppel.<sup>1</sup> To be sure, a consideration of this kind is not conclusive, for it may be that, although they did not use the name, the common law judges were really applying the principle of estoppel. A more natural explanation, however, is that there is some other principle that they had in mind in their decisions. As a matter of history, probably the origin of this doctrine, like that of other doctrines, of the law of agency is to be found in the fiction of the identity of principal and agent.<sup>2</sup> "*Qui per alium facit, per se ipsum facere videtur*"<sup>3</sup> meant then (1304) just what it said. Even if we discard the fiction as out of date, however, it by no means follows that, at least as applied to contracts, the phrase, "*Qui facit per alium, facit per se*," was not and is not based upon some rational principle, or that, discarding the fiction, we must also throw away the contractual theory. Second, the adoption of estoppel as the explanation of the result in question must be accompanied by the recognition of the fact—and Mr. Hufcut and Mr. Ewart so admit—that there is no meeting of the minds (in the legal sense of the words) of the principal and the third party, that is, no legally binding agreement—*no contract*—between them. The principal is liable, not because he has contracted, but because he is estopped to deny that he has. Before we finish our discussion, I think we shall find some curious results from this admission.

Coming now to our main problem:—I shall attempt to show in what follows that in the case of apparent as well as in that of real authority the liability of the principal is

<sup>1</sup> Y. B. 27 Ass., pl. 5, fol. 133; Anon. (1691) 1 Shower 95; Nickson v. Brohan (1712) 10 Mod. 109; Anon. v. Harrison (1698) 12 Mod. 346; etc.

<sup>2</sup> See in this connection the articles by Mr. J. Holmes in 4 Harvard Law Review, 345, and 5 Harvard Law Review, 1.

<sup>3</sup> Anon., Fitzherbert's Abridgement, Annuities, pl. 51.

based upon a contract into which he and the third party have entered by complying with the rules of the common law governing the formation of contracts.

My first proposition is this: It is fundamental in the law of contracts that a person is bound not by his real but by his manifested intention, i. e., by his intention as manifested to the other party. For the sake of brevity I shall in the remainder of this article, refer to this as the principle of manifested intention. It results from this that contracts often arise where there has been no mutual assent, no meeting of the minds of the parties, in fact. At the risk of being tedious I venture to recall to mind one or two familiar illustrations. (1) A sends by mail an offer to B. A the next day telegraphs B that the offer is withdrawn, but B, before the telegram reaches him, mails a letter accepting the offer. Is there a contract? The following well-known principles govern: An offer unless revoked remains open for a reasonable time;<sup>1</sup> a revocation to be effective must be communicated to the other party;<sup>2</sup> the contract is complete upon the mailing of the letter of acceptance, the offer being still in existence.<sup>3</sup> Assuming therefore that B's letter was mailed before the offer expired by lapse of time, a valid contract has arisen. Obviously, however, there has been no mutual assent, no meeting of the minds in fact, although there has been in law, the latter result being reached by the application of the principle of manifested intention. As yet no one has arisen to argue that, inasmuch as real assent on the part of A is lacking, there has been no meeting of the minds, and so that no contract has been made; that, therefore, the true explanation of A's liability is to be sought in estoppel—he has represented to B that the offer is still open, B has changed his legal position in reliance on this representation, and A is therefore estopped to deny that a contract has been made. I hope to show before I get through that the estoppel theory is little if any more rational in the

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<sup>1</sup> *Loring v. Boston* (1844) 7 Met. 409; *Ramsgate etc. Hotel Co. v. Montefiore* (1866) L. R. 1 Exch. 109; *Maclay v. Harvey* (1878) 90 Ill. 525.

<sup>2</sup> *Byrne & Co. v. Van Tienhoven & Co.* (1880) L. R. 5 C. P. D. 344.

<sup>3</sup> *Adams v. Lindsell* (1818) 1 B. & Ald. 323; *Dunlop v. Higgins* (1848) 1 H. L. Cases 381; *Tayloe v. Merchant's &c. Insurance Company* (1850) 9 How. 390.

case of agency than it would be in the case just cited. (2) Another illustration of the principle of manifested intention is found in the law of marriage. Although marriage is not a contract, the same legal principles as to mutual assent govern. A intending to lead B to believe that she is entering into a marriage with him, but with no intention of binding himself, represents to her that C is a clergyman duly authorized by law to perform marriage ceremonies. A and B go through a marriage ceremony before C, B acting in good faith throughout. C in fact is only a layman and is without authority in the matter. Is there a valid marriage? In a jurisdiction in which common law marriages are valid, yes.<sup>1</sup> Why? Because A is estopped to deny that C was a clergyman? Not at all; he has manifested his intention to B to take her as his wife; she has manifested her intention to him to take him as her husband, and the marriage is complete. The fact that A did not intend to bind himself is immaterial.

To apply this to the case in hand, we need, in order to establish the contractual theory of the principal's liability, to supplement the principle of manifested intention, by my second proposition, which is: One may manifest his intention (offer to contract) not only by his own words or acts but also through the words and acts of another, called by the law an agent. In the latter case, the complete expression of the intention is left to the agent; he is often, or perhaps usually, given a discretion to fix the terms of the offer, but when he does fix them, in law the manifestation is of the intention of the principal. But, the advocate of the estoppel theory may object, I admit that this is true if the agent was authorized; but, in the case of apparent authority only, he was not authorized. Therein lies a fallacy. The doctrine of manifested intention must govern. If I say to you: "John Doe is my agent, he is authorized to do so and so," it matters not whether as between me and John Doe that is true or not; if he does so and so, I am bound, because I have manifested my intention to be bound. To make the matter concrete: A says to B: "X is authorized to sell you my horse upon terms to be agreed upon between you and him." Privately A instructs X not to sell

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<sup>1</sup>Farley v. Farley (1891) 94 Ala. 501.

for less than \$150. X offers the horse to B for \$100 and B accepts. We all agree that A is bound. But why? By estoppel? So says the new school. A has not contracted with B, for he has not assented; there has been no meeting of the minds. To be sure there has not in fact, I contend there has been in law. A's statement to B is nothing more nor less than an offer to contract with him, leaving the terms to be fixed by X. In other words, he in effect says to B, "I will be bound by whatever terms of sale you and X may agree upon." When therefore, X offers to B the horse for \$100, in law A has offered the horse to B for \$100, and when B accepts, the contract is complete. How could any other result be reached without ignoring the fundamental principles of our whole legal system?

It would seem that the only avenue of escape from this conclusion is for the friends of estoppel to deny the validity of my second proposition, by asserting that there is a fundamental distinction between manifesting intention through a letter and through another human being, on the ground that in the latter case the agent possesses discretionary power. In the light of the following considerations this distinction appears not to be valid. In the case of real authority it is admitted that a true contract arises between the principal and third party. This result, however, can be reached only by admitting that I may manifest my intention to you through another person, and in so doing may leave discretionary power with that other person to fix the terms of my offer, i. e., to determine what my manifested intention is. Concretely, change the facts of our hypothetical case a little, by omitting the private instructions from A to X as to price. X goes to B and offers the horse to him for \$100. Has not A, in law, offered the horse for \$100? And if B accepts, is not the contract complete? Yet here the terms are fixed in the discretion of the agent, and it may be that A knows not what they are until long afterwards. There can be no contract unless A has manifested his intention to contract to B, and B to A. This is accomplished here only by A's manifesting his intention through X, his agent, and in fact the terms of the offer are fixed by X in his own discretion.

The recognition, therefore, of the existence of a true

contract in the case of real authority, is a recognition of the validity of my second proposition. That and the first proposition taken together establish the doctrine herein contended for, namely, that the liability of the principal in apparent authority rests as truly upon a contractual basis as it does in the case of real authority. The principal is bound by his intention as manifested through his mouth-piece, his agent, to the third party, the latter having accepted the offer thus made.

How can it possibly make any difference, from the point of view of the law of contracts, whether as between principal and agent the latter obeyed his instructions or not? If the principal has said to the third party, "This man is authorized to manifest my intention to you," and then the agent makes an offer within this apparent authority, has not the principal on all sound principles manifested to the third party his intent to contract? The fact that his actual intention was different is immaterial. It is submitted, therefore, that the only difference between real authority and apparent authority is that in the case of the former there is a meeting of the minds in fact as well as in law, i. e., the principal is bound and intends to be bound, whereas in the latter there is a meeting of the minds in law but not in fact, i. e., the principal is bound although he does not intend to be bound.

It is needless in this place to point out that in determining the apparent authority of an agent the acts as well as the words of the principal are to be taken into consideration. If A appoints B manager of his hotel he says to the world in general: "This man is authorized to make on my behalf all the contracts which persons occupying such a position usually make." Any private instructions or limitations communicated by A to B cannot limit this manifestation of intention, and it follows that when B makes one of the contracts in question, A is bound because he has thereby entered into a contract with a third party.

We may safely conclude therefore, that the point of view of the common law always has been, and it is to be hoped always will be, that the act of the agent is the act of the principal so long as the agent keeps within the scope of his authority,—real or apparent. This comes out clearly

in the rule that the contractual capacity of the agent is entirely immaterial,—a slave,<sup>1</sup> a married woman,<sup>2</sup> an infant,<sup>3</sup> anyone in fact, may be an agent. It is the principal, in all cases, who makes the contract, not the agent. This is carried, and logically so, to the extent of holding that an assumpsit to or by the agent for the principal may be laid as an assumpsit to or by the principal.<sup>4</sup>

Perhaps a large part of the difficulty experienced in dealing with this question arises from the somewhat misleading character of the phrase, "apparent authority." So far as the third party is concerned, the apparent authority of the agent is his real authority; the third party cares not and need not trouble himself about the state of affairs as between agent and principal. That is no concern of his; the law deals with manifested intention and that alone.

It remains now to point out that the two theories do not lead in all cases to the same result. It is of the essence of estoppel that the estoppel-asserter (to use Mr. Ewart's convenient phrase) has relied on the misrepresentation to his damage, that is, that he has changed his legal position in reliance on it.<sup>5</sup> What basis is there for estoppel, therefore, if all that the third party has done is to agree with the agent acting within the scope of his apparent authority? Has the third party changed his legal position in any way? For example, let us return once more to our hypothetical case of the agent who agreed to sell the horse for \$100 in violation of his instructions. Let us assume that the agreement between him and the third party is for future delivery and payment, that is, that it is purely executory. Consider the position of the parties the moment after the agreement is made. Has the third party changed his legal position in any way? If so, in what? To begin with, there is no contract, so it would seem at first sight that he is not bound. In the second place he is not estopped, for he has not misled anyone. Of course a basis for estoppel as against the principal arises if the agreement is not purely executory,

<sup>1</sup> *Chastain v. Bowman* (S. C. 1833) 1 Hill Law 270.

<sup>2</sup> *Emerson v. Blonden* (1794) 1 Esp. 142.

<sup>3</sup> *Watkins v. Vince* (1818) 2 Starkie 368.

<sup>4</sup> *Seignor and Wolmer's Case* (1624) Godbolt 360.

<sup>5</sup> Cf. *Huffcutt, Agency*, 2d Edition, pp. 63-64; *Ewart, Estoppel*, pp. 5-7.

but has been partly performed by the third party ; or if, although he has not performed, he has in some other way altered his legal position in reliance on the supposed contract.

Before, however, we can settle whether there is an estoppel against the principal in the case supposed—that is, where nothing has been done by the third party except to agree with the agent—we must consider the anomalous doctrine of ratification, which seems to complicate matters. In the case of an entirely unauthorized contract entered into by one person in the name of or on behalf of another, it is held that the "quasi-principal" may by ratifying make the contract binding on himself. It would seem that this doctrine applies to the case of the contract made by the agent within the scope of his apparent authority, assuming that the estoppel theory is correct. If so, before we can determine whether the third party has changed his legal position or not, we must see what the doctrine of ratification has to say concerning the position of the third party before the "quasi-principal" ratifies. We find two rules, one English, the other American. The English courts hold that although the principal is not bound, the third party is, that is, the "quasi-principal" may ratify although the third party has withdrawn his consent,<sup>1</sup> unless indeed the "quasi-agent" consents to such withdrawal.<sup>2</sup> If this be sound doctrine, we shall have to hold that although there is no contract between the principal and the third party, the latter is bound, i. e., the principal has it in his option to hold the third party or not ; that, therefore, the third party has by the mere agreement surrendered a legal right and consequently the conditions of estoppel are complied with.

This however, is not the prevailing doctrine within the United States, and, it is submitted, is not sound on principle. In the United States the cases hold that the third party may withdraw his consent at any time before ratification, on the ground that there is no mutuality, and no contract without mutuality of obligation.<sup>3</sup> Applying the American rule to the case in hand we have this result :

<sup>1</sup> Bolton v. Lambert (1889) L. R. 41 Ch. D. 295.

<sup>2</sup> Walter v. James (1871) L. R. 6 Ex. 124.

<sup>3</sup> Dodge v. Hopkins (1861) 14 Wis. 630 ; Atlee v. Bartholomew (1887) 69 Wis. 43 ; Townsend v. Corning (N. Y. 1840) 23 Wend. 435.

the third party is not bound because (1) there is no contract and (2) he is not estopped. The third party not being bound, he has not changed his legal position in any way; the essential condition for an estoppel is lacking and therefore the principal is not liable. Surely this is not the law. Is there, can there be, any doubt that both principal and third party are bound immediately after the executory agreement is made by the agent and the third party? On the basis of the contractual theory supported herein, both parties are bound at once in such a case; if we base the principal's liability on estoppel neither party is bound until something more happens—either a change of position on the part of the third party or a ratification by the principal. The choice then is not between two theories which lead to the same result, but between theories leading often but not always to the same result.

If the foregoing be sound reasoning, what has been demonstrated?

1. A person is always bound by his manifested intention.
2. One may manifest his intention through another person called an agent.
3. When, by words or acts, fairly interpreted, one has represented to another person or to the world at large that a certain person is his agent vested with certain authority, he has manifested to such other person or the world at large his intention to be bound by the acts of the agent within the scope of the authority thus represented to exist.
4. Therefore, when the person to whom this manifestation of the intention has been made has acted upon it by coming to an agreement with the agent acting within his apparent authority, the principal is bound because a contract has been entered into between himself and a third party. Both parties are bound by their manifested intention.

In conclusion, may we not fairly say that the advocates of estoppel as the basis of liability have been misled because of the fact that underlying the principle of manifested intention, as I have called it, and the principle of estoppel by misrepresentation there is a broader principle common to both—the principle, namely, of fair dealing as between man and man? A man is bound by his manifested intention be-

cause it is only fair that he should be ; any other rule would be not only impracticable but unjust. So in estoppel. If, having reasonable ground for anticipating that another will act upon my representations, I mislead him to his damage, it is only fair that I should be responsible for the result, and this responsibility is enforced by preventing me from denying the truth of my representations. The existence of this underlying principle, however, must not lead us to treat the two principles as identical—that can result only in confusion, as the preceding discussion clearly shows.

WALTER WHEELER COOK.